Question Q235

National Group: France

Title: **Term of copyright protection**

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Questions

I. Analysis of current law

It should be stated at the outset that, for the purposes of this study, only the Term of economic rights will be examined, as moral rights are perpetual (*Art. L. 121-1 of the Intellectual Property Code*).

1) Have the Berne Convention amended in 1979 (BC), TRIPS 1994 and the WIPO Copyright Treaty (WCT) been ratified by your country? Please provide your answer in relation to each individual international instrument, and provide dates and details of ratification.

1.1 Berne Convention

France signed the Berne Convention on 9 September 1886, and it was implemented into French law by the *loi du 28 mars 1887 portant approbation de la convention signée à Berne le 9 septembre 1886, concernant la création d'une union internationale pour la protection des œuvres littéraires et artistiques* [Law of 28 March 1887, approving the convention signed in Berne on 9 September 1886 relating to the creation of an international union for the protection of literary and artistic works] (Official Journal (*hereafter OJ*) 30-03-1887 p. 1505) and a *décret du 12 septembre 1887 prescrivant la*

promulgation de la convention signée à Berne le 9 septembre 1886, concernant la création d'une union internationale pour la protection des œuvres littéraires et artistiques [Decree of 12 September 1887 prescribing the promulgation of the convention signed in Berne on 9 September 1886 relating to the creation of an international union for the protection of literary and artistic works] (OJ 16-09-1887 p. 4185-4187).

Subsequently, France has ratified the following acts and protocol:

- **Act of Paris signed on 4 May 1896**, which was ratified on 9 September 1897 and entered into force on 9 December 1897,

- **Act of Berlin signed on 13 November 1908,** which was ratified on 30 June 1910 and entered into force on 9 September 1910, which was implemented into French law by the *loi du 26 août 1915 portant approbation du protocole additionnel à la convention de Berne, révisée pour la protection des œuvres littéraires et artistiques, du 13 novembre 1908, signé à Berne, le 20 mars 1914, par les plénipotentiaires des dix-huit Etats participant à cette union internationale* [Law of 26 August 1915, approving the additional protocol to the revised Berne Convention for the protection of literary and artistic works of 13 November 1908, signed in Berne, on 20 March 1914, by the plenipotentiaries of the eighteen States participating in this international union] (OJ 29-08-1915 p. 6060) and by the *décret du 28 mars 1916 portant promulgation du protocole additionnel à la convention de Berne révisée pour la protection des œuvres littéraires et artistiques du 13 novembre 1908, signé à Berne, le 20 mars 1914, par les plénipotentiaires des dix-huit Etats participant à cette union internationale* [Decree of 28 March 1916 promulgating the additional protocol to the revised Berne Convention for the protection of literary and artistic works of 13 November 1908, signed in Berne, on 20 March 1914, by the plenipotentiaries of the eighteen States participating in this international union] (OJ 11-04-1916 p. 3031-3032),

- **Protocol of Berne signed on 20 March 1914**, which was ratified on 28 November 1915 and entered into force on 2 February 1916,

- **Act of Brussels signed on 26 June 1948**, which was ratified on 22 January 1951 and entered into force on 1 August 1951, and which was implemented in France by the *loi n° 50-1557 du 21 décembre 1950 autorisant le Président de la République à ratifier la convention d'union internationale de Berne révisée, pour la protection des œuvres littéraires et artistiques, conclue à Bruxelles le 26 juin 1948* [Law No. 50-1557 of 21 December 1950 authorizing the President of the Republic to ratify the revised Convention of the international union of Berne for the protection of literary and artistic works, concluded in Brussels on 26 June 1948] (OJ 22-12-1950 p. 12998) and by the *décret n° 51-458 du 19 avril 1951 portant publication de la convention de Berne pour la protection des œuvres littéraires et artistiques signée le 9 septembre 1886, complétée à Paris, le 4 mai 1896, révisée à Berlin le 13 novembre 1908, complétée à Berne le 20 mars 1914, révisée à Rome le 2 juin 1928 et révisée à Bruxelles le 26 juin 1948* [Decree No. 51-458 of 19 April 1951 promulgating the Berne convention for the protection

of literary and artistic works, signed on 9 September 1886, supplemented in Paris on 4 May 1896, revised in Berlin on 13 November 1908, supplemented in Berne on 20 March 1914, revised at Rome on 2 June 1928 and revised in Brussels on 26 June 1948] (OJ 24-04-1951 p 4064 and corrigendum, OJ 18-05-1951 p 5131).

- **Act of Paris signed on 24 July 1971**, which was ratified on 11 September 1972 and entered into force on 10 October 1974 with regard to Articles 1 to 21 and on 15 December 1972 with regard to Articles 22 to 38, by means of the *décret n° 74-743 du 21 août 1974 portant publication de la convention de Berne pour la protection des œuvres littéraires et artistiques du 9 septembre 1886, complétée à Paris le 4 mai 1896, révisée à Berlin le 13 novembre 1908, complétée à Berne le 20 mars 1914 et révisée à Rome le 2 juin 1928, à Bruxelles le 26 juin 1948, à Stockholm le 14 juillet 1967 et à Paris le 24 juillet 1971* [Decree No. 74-743 of 21 August 1974 promulgating the Berne convention for the protection of literary and artistic works of 9 September 1886, supplemented in Paris on 4 May 1896, revised in Berlin on 13 November 1908, supplementedin Berne on 20 March 1914, and revised in Rome on 2 June 1928, in Brussels on 26 June 1948, in Stockholm on 14 July 1967 and in Paris on 24 July 1971] (OJ 28-08-1974 p.8963 and, corrigendum, OJ 25-10-1974 p. 10887).

1.2 TRIPS 1994

France has ratified the Agreement on Trade Related Aspects of Intellectual Property Rights, accessing to it on 1 January 1995.

The ratification of the agreement establishing the WTO and of its 4 annexes was authorized by Law No. 94-1137 of 27 December 1994, published in the OJ of 28 December 1994 p. 18536.

Decree No. 95-1242 of 24 November 1995 promulgates the Marrakesh Agreement establishing the WTO (together with 4 annexes), which was signed in Marrakesh on 15 April 1994, and published in the OJ of 26 November 1995 p. 17314.

1.3 The WIPO Copyright Treaty 1996

France signed the Treaty on 9 October 1997. It deposited the instrument of ratification on 14 December 2009, with entry into force on 14 March 2010.

The ratification of the WIPO Copyright Treaty, which was adopted on 20 December 1996, was authorized by Law No. 2008-1574 of 19 June 2008, published in the OJ of 20 June 2008 text 6/161, p. 9947.

2) Have the minimal obligations in respect of Term of protection of copyright imposed by these international instruments been implemented in your country's laws? By means of which legislation? Please respond in relation to each of RBC, TRIPS and WCT.

a) If the answer is no please specify (i) which obligations have not been implemented, (ii) give any reasons why this has not proved possible and (iii) whether there are any current proposals for their implementation.

With regard to the Berne Convention, the minimum Term of copyright protection was already of 50 years after the death of the author before France joined and ratified it. It was therefore not necessary to amend French law in order to implement this point.

Likewise, no amendment of French law was required following accession to the WTO and ratification of the TRIPS agreements; since the Term of copyright protection in 1994 was already 50 years after the death of the author, which is higher than what is stipulated in Article 12 of TRIPS, which provides that "*Whenever the term of protection of a work, other than a photographic work or a work of applied art, is calculated on a basis other than the life of a natural person, such term shall be no less than 50 years from the end of the calendar year of authorized publication, or, failing such authorized publication within 50 years from the making of the work, 50 years from the end of the calendar year of making.*"

Finally, the WIPO Copyright Treaty does not provide for any changes regarding the Term of copyright protection. Consequently, no amendment of French lawwas made in this respect.

3) Do your laws provide for TRIPS + obligations with respect to the Term of protection? Please provide details of any legislation that imposes this, and specify whether it is Domestic or Regional legislation.

The Term of copyright protection in France does indeed correspond to TRIPS + standards in that this Term of protection corresponds, as of today, to the life of the author plus 70 years after his death. This standard of protection results from the implementation in France, via Law No. 97-283 of 27 March 1997 (OJ of 28 March 1997), of Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights.

The preamble to this directive justifies this extension of the Term of protection as follows: "*the minimum term of protection laid down by the Berne Convention, namely the life of the author and 50 years after his death, was intended to provide protection for the author and the first two generations of his descendants; whereas the average lifespan in the Community has grown longer, to the point where this term is no longer sufficient to cover two generations*".

In application of this directive, Law No. 97-283 implements the following Terms of protection into French copyright law:

- the general rule concerning known and individually identifiable authors is that copyright "*shall subsist for his successors in title during the current calendar year [on the death of the author] and the 70 years thereafter*", with it being specified on the one hand,that in the case of works of joint authorship the calendar year to be taken into accountis that of the death of the last

surviving author of the work and, on the other hand, that for audiovisual works of joint authorship the authors to be taken into account for the purpose of determining the Term of protection are the author of the screenplay , the author of the adaptation, the author of the dialogue, the author of the musical compositions with or without words specifically composed for use in the work, and the director.

- for pseudonymous, anonymous or collective works, the Term is of 70 years from 1 January of the calendar year following the year in which the work was published.

- for posthumous works disclosed after the expiry of copyright protection according to the generalrule, the Term of protection is of 25 years from 1 January of the calendar year following the year in which the work was communicated to the public.

- for nationals of States that are not members of the EuropeanUnion, the Term of protection is that granted in the country of origin, but may not exceed the term provided for in France by the law and the directive.

Directive 2006/116/EC of 12 December 2006, consolidated version repealing Directive 93/98/EEC, contains the same principles with regard to the Term of copyright protection.

4) Have the Terms moved in an upward direction with ensuing revisions of your domestic laws, or as a result of any obligations derived from regional laws? Please provide details. Are there any current proposals for continued increases in Term of protection generally, or in relation to any specified categories of work? Please specify.

Yes, the Terms have moved in an upward direction.

Initially, the Decree of 13-19 January 1791, which acknowledgedthe right of performance, provided for a term of protection forthe life of the author and for five years thereafter. The Decree of 19-24 July 1793 supplemented this text by then acknowledgingthe right of reproduction. It was then provided that "*authors of writings of all kinds, composers of music, painters and designers who engrave pictures or designs shall enjoy fortheir entire life the exclusive right to sell, to allow to be sold, and to distribute their works within the territory of the Republic, and to assign ownership thereof in whole or in part*". Five years of protection after the death of the author is again granted.

The Term of protection granted to the successors in title after the death of the author was then progressively increased to 20 years (Decree of 3 February 1810), then 30 years (Law of 8 April 1854), then 50 years (Law of 14 July 1866).

Today, copyright protection in France results mainly from Law No. 57-298 of 11 March 1957, the provisions of which were supplemented by those of Law No. 85-660 of 3 July 1985.

It should be noted that the Law of 1957confirms that, on the death of the author, the right "*shall subsist for his successors in title during the*

current calendar year and fifty years thereafter". However, the Law of 1985 introduced two exceptions, stating that "*for musical compositions with or without words, this term shall be seventy years.*" (Art. 8) and that, for software, the rights "*shall expire after a period of twenty-five years starting from the date of the creation of the software*" (Art. 48). Article 9 of Law No. 94-361 of 10 May 1994 then repealed Article L. 123-5 of the Intellectual Property Code, which provided for this specific term, so as to make software subject to the termprovided as a general rule.

Law No. 97-283 of 27 March 1997, implementing Directive 93/98/EEC of 29 October 1993, has then extended the protection to 70 years *post mortem auctoris*, a solution which is now applied generally to all types of work.
The new Term of protection raised the question of works "*brought back to life*" by this additional period of 20 years. It should be noted that the directive of29 October 1993 specified that the Member States had to apply it asfrom 1 July 1995. As the corresponding French law was not passed until 1997, the legislator provided for a retroactive application to 1 July 1995.

It was agreed by way of transitional provisions that works which had not yet entered the public domain on 1 July 1995 would benefit from the provisions of the new law, as would works that had entered the public domain in France but were still protected in at least one of the countries of the European Community on 1 July 1995.Howeverinfringements of the new law can give rise to criminal proceedings only if they were committed after the publication of the new law (28 March 1997).

Directive 2006/116/EC of 12 December 2006 repealed Directive 93/98/EEC, without making any change to the term of protection to be applied. It is stated that "*references made to the repealed Directive shall be construed as being made to this Directive*", and this has been implementeded into the French Intellectual Property Code.

5) What is the existing rationale/justification under your laws for the existing Terms of copyright protection? In particular, is the rationale/justification a merely economical one or are other reasons given? Have there been/is there currently any academic/judicial or general criticism of this rationale? Are you aware of any economical, sociological or other studies justifying or criticizing the current Term?

5.1 The Term of protection is justified by reasons that are:

- *pragmatic*

  . If the term was longer, there would be more successors in title.
  Beyond a term of 70 years, i.e. two generations after the author, the number of successors in title would be such that it would be difficult to exploit the work on account of the numerous authorizations that should be collected from the heirs.

  . The minimum term of protection provided by the Berne Convention, that is to say the lifetime of the author plus fifty years after his death,

was intended to protect the author and the first two generations of his descendants.
However, the average lifespan has grown longer to the point that that the said term is no longer sufficient to cover two generations, and pragmatism justified the lengthening of the term of protection to 70 years after the death of the author.

- *economic*

A term of 70 years appears to be sufficient to compensate the author for his contribution – this is the livelihood aspect of copyright. The idea is to guarantee him peaceful enjoyment of the fruits of his work, hence the historic establishment of war-related term extensions which were intended to compensate for the loss of earnings suffered by the author or his successors in title on account of the hostilities, as well as the term extension of 30 years when the author died for France. The object of this last extension, which is still in force (*Art. L123-10 Intellectual Property Code*), is to compensate for the loss caused to the successors in title by the premature death of the author.

- *philosophical*

Copyright must not stand in the way of the dissemination of the knowledge necessary for the emancipation of Society – this is a societal conception of copyright which dates back to the Revolution.

Some people even consider that the purpose of a work is to enter the public domain.

5.2 For a long time, some scholars argued, against a limited term of protectionthat copyright is a property right, which should be granted an unlimited term of protection on that basis.

This conception of copyright as a perpetual property right, established by way of grand declarations at the end of the 18th century at the time of the Revolution, very quickly collided with the societal conception of copyright: copyright is envisaged as a social contract by means of which the State grants a temporary monopoly to the author, in exchange for which he will divulge his work so as to enrich society. Only this limited term would be ableto guarantee access to knowledge and culture for the public, on the one hand, and freedom of trade and industry for those exploiting the rights. Renouard wrote that “a law on this subject could only be good on the double condition of sacrificing neither the right of the authors to that of the public nor the right of the public to that of the authors.”

Renouard’s advocacy of the utilitarian and positivist conception of copyright was shared by others: the writer Victor Hugo, the economist Wolowski and also the anarchist thinker, economist and socialist Proudhon.

Since the author derives his inspiration from the common cultural heritage of humanity in order to create his works, these works must ultimately return to the public domain, that is to say to the society which contributed to their creation. The remuneration of the author is consideration for a “service that he provides to society”.

Consequently, the term of the exclusive rights of exploitation conferredon the author by the law can only be limited in time.

5.3 Today, although this debate about perpetuity appears to be closed, some scholars consider the current term of the economic rights to be completely disproportionate, in particular in comparison with the term of the exploitation rights granted to the proprietor of a patent or a design.

This Term of copyright protection is said to be irrational. The period of exploitation of a great many works is no more than a few years. If a work is still of interest ten years after its publication, it is generally because it has changed of status and become a cultural reference point, and it should then be put at the free disposal of all.

This current Term of protection is said to have the effect:

- of not encouraging producers or industry to update old creations which have not yet entered the public domain, given that copyright, unlike other branches of intellectual property, does not sanctionthe lack of exploitation of the work by way of revocation;

- of placing many successors in title in a position of abuse of a dominant position over the works which have achieved the status of cultural reference points. This is the case in particular with certain works which are already part of school or university curricula while not yet being in the public domain, and with works by painters such as Picasso, which are already part of the cultural heritage of Humanity.

Finally, the prolongation of copyright is justified to an even lesser degree given that works can now be the subject of worldwide exploitation, and can in a few weeks bring millions of euros of royalties totheir authors, which was not the case until a few years ago.

It is essentially the digital age, the age of new technologies and globalization, which has given rise to the fiercest criticisms in relation to the term of copyright protection of 70 years *post mortem*. Although the debate requires to mention the criticisms of ultra-liberals, itmust be noted that some of thesecriticisms are connected with a communist and anarchist movement and have economic and legal objectives of appropriating and denying property.

In France, it is apparent that certain organizations which campaign for freedom of access to culture and knowledge on the Internet are geting organized. This is the case in particular with *La Quadrature du Net* [the Squaring of the Net].

In August 2012 this organization issued a series of proposals for reforming copyright at a French and a European level, which were based around the sharing of culture and knowledge and freedom of expression, leading to the freedom to reappropriate and modify works on the Internet (remix). The measures proposed include“returning to a reasonable term for copyright and related rights which respects the rights and liberties of citizens on the

Internet". Recently, *La Quadrature du Net* has opposed the evolution of the draft law "on the protection of digital rights and liberties", which is anticipated in France for the beginning of 2014, regarding the recent positions adopted by the government as being the "extensionof a repressive logic" and fearing a debate confined to the question of the neutrality of the Net.

Like *La Quadrature du Net*, the Pirate Party also campaigns in favour of a reduction of the current copyright term. It argues for changing the starting point of the term: the term of the rights would thus have to run not from the death of the author but from the publication of the work. The justifications put forward by the Pirate Party are based on the contradiction that would result from extending still further the term of protection when the distribution of works has become more rapid and more extended with dematerialization, and on the injustice that the starting point for the term, namely the death of the author, represents given the difference in longevity of the artists (since the term of protection should be the same for everyone).

These defenders of "cyberspace", who object to what they consider to be a privatization of culture, derive their strength from the fact that dematerialization has made it impossible to control the exchange of information and knowledgewhich occurs via the Internet with disconcerting rapidity and ease.

What is the position of the academic world in this regard? While many academics see the current term as a fair compromise between the interests at play, certain commentators have objected to the constant lengthening of the term of copyright over the centuries.

Professor Bruguière regards this as a return to the "*rent*s" of the *Ancien régime*, which would be harmful to freedom of trade and industry and would raise the risk of encouraging infringement. In this regard he refers to the words of the Count of Ségur in 1836: he feared that perpetuity "*institutes, for the benefit of the heirs of the author or his successors in title, a sort of perpetual tax on the book trade, thus increases the market value of books and places a premium upon infringement in foreign countries…".* The diminution of the public domain brought about by the lengthening of the terms of protection for its part constitutes a brake on freedom of enterprise and an attack on freedom of communication. Accordingly, it is necessary "*to be able to submit to the testing of economic analysis the question of the term of the monopoly and to acknowledge that it is unsuitable. Or to concede philosophically that, while the interests of the author must be preserved, those of the public may not be ignored*."

Another criticism, of a technical nature, is made against the Term of protection. It emphasizes that for certain creations, such as software, the justification for the current term comes up against the "*phenomenon of obsolescence*". This would make no sense to give70 years of *post mortem* protection to software which is outdated aftertwenty years.

To summarize the views of these authors, too much protection kills protection. Professor Valérie-Laure Bénabou draws the following lesson from what is in her view the "nonsense" of protecting software for more than twenty years: "*The lengthening of the term is not only pointless for most works but also it tends to discredit copyright by making it a little more like a property right. The tendency towards perpetuity gives credence to the idea, which is not popular, of a guaranteed income which no longer has any connection with the author of the work from which the receipts originate, nor even with the requirements of a return on investment. A better perceptionof copyright could accommodate an adjustment of the term without damaging the protection. Its social purpose would thus be reaffirmed."*

The question of whether there are any economical, sociological or other studies justifying or criticizing the Term of protection has also been asked. To our knowledge there are very few.

The report on *l'économie de l'immatériel* [the economy of theimmaterial], which was published in November 2006, under the directionof Maurice Lévy and Jean-Pierre Jouyet, may be mentioned. Although the authors of this report do not formulate any recommendation for or against the current term of copyright, they provide the following opinions: *"In many areas which are confronted with technological change, we ask ourselves how to protect what exists whereas we should first seek to take advantage of the change in the best way possible. In acting as we do, we stifle the development of new activities and new jobs. The online music and games industries represent two recent examples of this type of reaction. The proposals of the Commission are aimed at moving away from this temptation to retain a guaranteed income and providing a chance to innovate and create. (...) the act of putting up barriers to the movement of ideas is not always based on economics and, in many cases, new ideas and new innovations arise from this very movement. The example of free software or else the "wiki" phenomenon are two examples of the fecundity of the unconstrained exchange of ideas and knowledge. The economy and society as a whole thus have a certain interest in preventing intellectual property rules from holding back creativity and innovation. (…) Furthermore, increasing the term of protection does not guarantee that there will be more creations. Firstly, the extension of the term of protection will relate to works whose authors are dead, a circumstance which seriously reduces the impact of the measure on their creative capacity. Secondly, and more fundamentally, it is doubtful that an artist's creation incorporates an economic calculation relating to the term of protection from which his successors in title or the publishers of his works could benefit."*

In addition, the study of Professor Pollaud-Dulian which is devoted to the term of copyright and was publishedjust after the implementation in France of European Directive 93/98 of 29 October 1993 may be mentioned. In that study, he deals with the issues and considerations which have lead tothe current term of protection: (i) originally, a compromise between the individual interest of the author who wishes to benefit, for himself and his

family (two generations), from remuneration in consideration for his creative work and the publication thereof; the interest of the public which wishes to freely access the published works; and the interest of those exploiting the works, for whom the exploitation must be profitable. In this case, the interest of those exploiting the works is in line with that of the authors, since those exploiting the works have an interest in preserving their monopoly of exploitation forthe longest possible term to foster returns on investments. (ii) Then, the wish to take into account the lengthening of lifespan and the need to harmonize the term within the European Union, the differences of terms constituting "*barriers to free movement, free provision of services and free competition*". Harmonization within the Union on a "levelling-up" basis, which was advocated by the Dietz report, seems to have been imposedso as not to challenge acquired rights and to limit the transitional measures.

Finally, the mission given by the French government to Mr Pierre Lescure in August 2012 should also be mentioned: studying the mechanisms for adaptation of the instruments brought in during the 1980s in light of the major developments associated with digital technology. The so called"Lescure" or "Culture Acte 2" Commissioncovers an international, in particular European, context. The findings of the report are expected in principle in mid-May 2013. When interviewed by the Lescure Commission on 6 December 2012, the Pirate Party reaffirmed its desire to see a reduction of the term of copyright.

Finally, others advocate a further revision of this Term for the following reasons:

- *Adjustment of the term of protection depending on the type of work in question*,

  For collective works, the American case where the term of copyright is extended for collective works of corporate entities could be taken as an example. The *Sonny Bono Copyright Term Extension Act*, which was passed in 1998, extended copyright over collective works of corporate entities to 120 years from their creation or 95 years from their publication, whichever of those terms is the shortest , thus adding 20 years to the term which had existed before this law entered into force.

  Indeed, the lengthening of the term of protection for this type of works is justified by *economic criteria* (protection of major investments), has produced positive results and is not currently the subject of any plans for reform backwards.

- *Public policy,*

  At a time when the dissemination of hatredand of encouragements and incentives to violence and discrimination, in particular over the Internet, are in the news, and given the increased dissemination of a certain type of message that for example *Mein Kampf* would carry outonce it is in the public domain in 2016, it seems necessary to undertake a study of the consequences of the entry into the public domain of works the dissemination of which could have been restricted at the time when they were protected by copyright.

The proposal is to makethe work available, at the optionof the publisher, with a historical introduction provided withan electronic acknowledgment to assistthe Internet user to chooseto access the educational versions. A warning of hatred content, comparableto the warning labels which exist formovies, television broadcasts, video games, “explicit” content in music, etc., could also allow to alert users and to place the content in context (*see the proposal of the Hate Prevention Initiative: www.hateprevention.org*).

Beyond the actual Term of protection of this kind of works, the question of their exploitation after their entry into the public domain could thus be broached.

II. Proposals for harmonization

Groups are invited to put forward proposals for the adoption of harmonized rules in relation to Term of copyright protection. More specifically, the Groups are invited to answer the following questions:

6) In your opinion do the current Terms of copyright protection provide “adequate” standards of protection? Is this protection adequate for all interested parties i.e. authors/commercial providers/consumers? Please give reasons for your answer.

The current term of protection (in principle 70 years from the 1 January following the death of the author or 70 years from publication in the case of collective, pseudonymous or anonymous works) appears to be adequate overall. In general, copyright provides a balance between the interests of a proprietor (the author and his heirs), of his contracting partner who generally exploits the work (licensee or assignee of rights) and of the public (also increasingly qualified as consumers). Such a term of protection achieves a balance between these different interests in play which are not necessarily antagonistic to each other.

Thus, the author is protected for allhis life. If he has assigned his rights, he may often benefit from a proportional remuneration, which will guarantee him an income if his work is exploited. Then, his family which has known him will benefit from this protection for on average two generations, whichtakes into account the lengthening of lifespans. It would not be wise to extend the term of protection. The number of heirs would multiply, which would make it increasingly difficult to managethe rights. In addition, experience shows that, beyond one generation, the heirs sometimes lose interest in the work, which is demonstrated for example by the very small number of lawsuits brought by heirs who are remote from the author. Furthermore, the heirs may abuse their prerogatives by not exploiting the work at all or by exploiting it badly. Besides, this isthe reason why Article L. 122-9 of the Intellectual Property Code sanctionsabusive use or non-use of economic rights. It is therefore inappropriate to increase the current term.

With regard to those exploiting the work, they benefit from a period which is long enough to make a profit on their investment (part of the life of the author if they have had the rights assigned to them + the term of protection after the death of the author). In addition, even if contractual practice frequently provides clauses relating to the term of the copyright, it must be noted that very often the works stop being exploited long before they enter the public domain. Finally, those exploiting the work also have an interest in works

entering the public domain sothat they can exploit them freely and without having to request authorization and without paying remuneration.

As for the public, it is important that it can, while respecting copyright, have access to the works in the context of a legal offer. It thus benefits from the effects of protection since the public will have access to the works thanks tothe investments made by those exploiting the work on the basis of the protection that is granted to them. However, it is also interestingthat the public can benefit from access to works that have entered the public domain.

In fact, the current term of protection benefits the authors, those exploiting the works and the public. It achieves a delicate balance between the different interests in copyright, which are not necessarily antagonistic to eachother.

Admittedly, it is possible to assert that, for certain works, the current term is too long. This is merely one of the illustrationsof the disconnectionbetween the copyright law regime which was thought of, conceived and developed while contemplatingpure works of art, and the actual subject of copyright, which extends its realm over creations whose originality is low. Thus, certain works have an ephemeral form, which, besides, renders uselessany protection exceeding a few years, a few months, a few days or even a few minutes (oral works which are not fixed, works made of chocolate, hairstyles, olfactory works, installations etc.). Other works are intimately connected to a technology that is by essence still evolving (software, Internet works, etc.), so that the current long term seems useless. Other works by their nature have a limited lifetime from an economic perspective (technical writings, information works, notices, press articles, fashion and applied arts, etc.). Finally, other works will fade into oblivion and will become orphans or will be ignored by their owner. In this regard it must be noted that, under French law, the Law of 1 March 2012, without modifying the term of protection, has addressed the implications of a term that is excessively long by creating a specific distribution regime for unavailable books or by acknowledging the status oforphan works. In all of these situations the term of protection may seem too long and useless, or even without object.

On the other hand, for certain works the term of protection may seem not long enough. Specifically, certain works, which generally originate from the pure arts (music, literature, audiovisual work, painting), may experience success (even sometimes belatedly, including when the artist is recognized after his death) which is still significant at the time that they enter into the public domain. It may be that this applies for all the works of an artist. The entry of these works into the public domain at the height of their glorywould thus prevent the heirs of the author from receiving the fruits of his creation. It is also necessary to mention the example of characters, who are protected as works, and who can continue to live adventures in successive works. In other words, these works, which are actuallynot so numerous in comparison with the total number of works protected, will enter into the public domain at thepeak of their fame. Also, the lengthening of the term of copyright protection in certain countries such as the United States of America may be the source of discordances. There are nevertheless a number of possible ways of extending the monopolies in one way or another. For example, a novel will be translated, which will allow the work which is the translation to be protected. Other works will be filed as trademarks. Independently of intellectual property, it will be possible to resort to the notion of parasitism to sanction those who, at no expense, free ride on the coat-tails of a work which has entered the public domain but in which many investments have been focused.

It must therefore be stated that the term will sometimes be too long or too short. In the past, software only benefited from a term of 25 years between 1985 and 1994. Conversely, between 1985 and 1997 musical works benefited from a term of protection of 70 years after the death of the author even though, at the time, works were only protected for 50 years after death. However, these peculiarities no longer exist and may no longer exist in French law in view of the harmonization by way of European Union law. For example, this obliged the French courts to repeal *de facto*in 2007 the extensions of term on account of the two world wars (*Court of Cassation, 1st civil chamber, 27 February 2007*). In addition, establishing different terms would amount to taking into consideration the merit or the purpose of the work, would breach the principle of equality of works before the law and could even lead to discriminations. Moreover, this would necessitate massive categorization exercises, not forgetting the case of complex works which, following the example of video games or multimedia creations, allow works of different genres to coexist. It would then be difficult to determine the appropriate term.

By way of summary, there is certainly no perfect term, because certain works will suffer from too short a term whilst others will be subject to too long a term. However, it remains that the current term as applied in France achieves a delicate balancing between the interests of the author, those exploiting the works and the public.

7) Do you think that there is a need for an upper limit on Term in international treaties? Please provide your reasons.

The various International Treaties provide for minimum terms of protection, varying between 25 and 50 years after the death of the author, depending on the nature of the work.

On the other hand, these Treaties do not consider any upper limit.

However, the establishment of an upper limit proves to be necessary in a number of respects.

Establishing an upper limit would firstly allow diverging interests to be reconciled in an optimal manner:

- the interests of the author, who has to be able to live from his creations;
- the interests of the public / of consumers, who seek to obtain the published works quickly, and if possible freely and without charge;
- the interests of those who exploit the works, for whom this exploitation must be profitable.

Furthermore, this would avoid excessively great divergences between States as far as term is concerned.

This would thus promote the free circulation of the works: an upper limit would unify the term of protection and avoid the occurrence of anomalous situations (in which a work is protected in State A while it is no longer protected in State B).

The current Term of protection appears to the French group to be the most appropriate solution.

This is because it allows the author to be remunerated and for him to allow his heirs to benefit thereof over approximately two generations.

A longer term does not seem justified, all the more given the particular nature of copyright (which – let it be recalled – has the objective of remunerating the author). There is no justification for very distant heirs being able to claim economic rights after a relatively long period of time has elapsed.

In addition, such a term allows creative activity to be stimulated; a longer term would have the opposite effect and would thus run the risk of paralysing any creative endeavour.

Therefore, the upper limit should be set at 70 years after the death of the author for works for which an author is identified and which are published in his lifetime, bearing in mind that the moral right as defined in France, which is perpetual and inalienable, would allow the work to be respected forever, even after the economic rights have entered the public domain.

On the other hand, the principle of establishing an upper limit could be brought together with the possibility for States to provide for exceptions where they are properly justified and, in particular, very precise with regard to their scope. It is by this means that, for example, France, in Article L. 123-10 of the Intellectual Property Code, allows the term of protection to be extended by a "*term of thirty years when the author, the composer or the artist died for France, as evidenced by the death certificate*".

8) Would you like to see the Terms of copyright protection changed? If yes, should the changes take place within the confines of the existing international treaties? Please give your reasons.

The French group considers that the Terms of copyright protection that are in force are appropriate overall. Accordingly, the French group does not wish thatthese Terms be lengthened.

It is true that harmonization of the Terms of protection in the various countries would be useful in order to prevent a work being in the public domain in one country while it is still protected in another country. Such a harmonization would require the Terms of protection to be changed in a certain number of countries, and if this were to be the case this should be done with an upper limit (*see above, question 7*) and within the limits of the international treaties. Nevertheless, in view of the diversity of the Terms of protection in the various countries, achieving such a harmonization seems difficult, if not illusory.

9) If your answer to 8 is yes and you would like to see the current Term of protection changed, please indicate whether changes should take place in relation to all categories of work, or only in relation to specific categories of work. If only in relation to specific categories of work, please specify which categories of work, and give your reasons for this choice.

The French group is not in favour of a change in the Terms of copyright protection.

Nevertheless, in any event, the French group is not in favour of differentiating the Terms of protection according to categories of works. This is because the French group is attached to the principle according to which intellectual works are protected by copyright on condition that they meet the required conditions, but regardless of their genre, form of expression, merit or purpose. Accordingly, all intellectual works which meet the conditions for copyright protection must benefit from the same term of protection. Thus, the extent of copyright protection must be the same for all categories of works.

This principle has furthermore been affirmed in point 6 of the response to Question 231 on industrial products: "*The extent of copyright protection for an industrial product should not differ from the extent of the protection normally conferred by copyright*."

10) Please list the factors or criteria that should in your view be used to arrive upon the optimum Term of copyright protection for any specific work, or in general. What in your opinions would this optimum Term(s) be?

The French group considers that the current Term of copyright protection is satisfactory and opposes the differentiation of the Terms of protection depending on the categories of works.

However, the following initiatives should be mentioned, which aim either to reduce OR to extend the Term of copyright protection depending on various criteria, or to employ mechanisms which, while they do not change the Term of protection, allow the exercising of economic rights by their owners to be obstructed or limited:

- The recommendation of the European Commission of 17 July 2012 to all the Member States of the Union, inviting them to set out their positions on wide-scale deployment of open access to the results of their research (Open Access).

  France indicated that it would follow the recommendation of the European Commission which will result in free access to the publications of research financed by public funds after a maximum period of 12 months in respect of "publications in the fields of social and human sciences": the *societal criterion* is used here as a justification for an obstruction of exclusive rights at the expiry of a very brief period, without the works concerned entering into the public domain.

- Article L 122-9 of the Intellectual Property Code on access to orphan works:

  > *In the event of obviousabuse in the exercise or non-exercise of the rights of exploitation by the deceased author's representatives referred to in Article L. 121-2, the first instance court may order any appropriate measure. The same shall apply in the event of a dispute between such representatives if there is no known successor in title, or in the event of the rights being* bona vacantia *or unclaimed.*

The *pragmatic criterion* (but also the public interest) justifies the obstruction of abuse in the exercise of the economic right after the death of the author, without the work entering into the public domain.

- Law No. 2012-287 of 1 March 2012 relating to the digital exploitation of unavailable books (cf. question 6).

  Here too, the *pragmatic criterion* justifies an adjustment to the exclusive character of the economic right without the work entering into the public domain.

Summary

France has ratified the main international instruments on copyright (Berne Convention, TRIPS, WIPO Treaty).

The Terms of copyright protection in France meet TRIPS + standards, since they correspond:

- to the life of the author plus 70 years after his death (general rule);
- to 70 years from 1st January of the calendar year following the year in which the work was published, for pseudonymous, anonymous or collective works;
- to 25 years from 1st January of the calendar year following the year in which the work was communicated to the public, for posthumous works disclosed after the expiry of copyright protection according to the general rule.

These terms of protection appear to be adequate overall since they achieve a balance between the interests of a proprietor (the author and his heirs), of his contracting partner who generally exploits the work (licensee or assignee of rights) and of the public.

The French Group proposes:

- to establish an upper limit concerning the Terms of protection in the international treaties so as to avoid divergences between States in this regard;
- not to extend the current Terms of protection,
- not to differentiate the Terms of protection according to categories of works.

Résumé

La France a ratifié les principaux instruments internationaux sur le droit d'auteur (Convention de Berne, ADPIC, Traité de l'OMPI).

Les Durées de protection du droit d'auteur en France répondent à des normes « ADPIC + », dans la mesure où elles correspondent :

- à la vie de l'auteur plus 70 ans après sa mort (règle de droit commun)
- à 70 ans à compter du 1er janvier de l'année civile suivant celle où l'œuvre a été publiée pour les œuvres pseudonymes, anonymes ou collectives,

- à 25 ans à compter du 1er janvier de l'année civile suivant celle de la communication au public pour les œuvres posthumes divulguées après l'expiration de la période de droit commun.

Ces Durées de protection apparaissent comme étant globalement adéquates en ce qu'elles paraissent réaliser un équilibre entre les intérêts d'un propriétaire (l'auteur et ses héritiers), de son cocontractant (licencié, cessionnaire des droits) et du Public.
Le Groupe Français propose :

- d'instaurer un plafond concernant les Durées dans les traités internationaux afin notamment d'éviter des divergences en matière de durée entre les Etats,
- de ne pas allonger les Durées actuelles,

de ne pas différencier les Durées selon les catégories d'œuvres.